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No. 88-2130

In The Supreme Court of the United States October Term, 1988

OSCAR O. D'ANGELO,

Petitioner,

v.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

MOTION AND BRIEF AMICUS CURIAE OF THE ILLINOIS STATE BAR ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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MOTION OF THE ILLINOIS STATE BAR ASSOCIATION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Pursuant to Rule 36.1 of this Court, the Illinois State Bar Association (ISBA) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for certiorari. Movant has been unable to secure the consent of respondent.

The ISBA is a bar association of 32,000 members throughout the state of Illinois. The ISBA has concentrated its efforts on the improvement of the judicial process. The ISBA believes that the decision below is threatening to lawyers who would become subject to disciplinary sanctions on the basis of after the fact

amendments and interpretations to court rules by means of decision disbarring an attorney. The ISBA also views the decision below as threatening its members with unfair procedures in the considerations of sanctions. The ISBA believes that its views will be helpful to the Court in emphasizing the importance of this petition.

Respectfully submitted,

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QUESTION PRESENTED

The Illinois State Bar Association's interest as amicus is whether fundamental notions of due process and equal protection of the law are violated by the imposition of disbarment on an attorney for conduct which the Illinois court finds for the first time is a significant factor warranting disbarment - the giving of something of value to public officials or employees, without any showing of illegality or frustration of public policy, especially where other attorneys have escaped sanctions because "[t]hey acted without guidance of precedent or settled opinion . . . ."

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Interest of Amicus

The Illinois State Bar Association (ISBA) respectfully submits this brief as amicus curiae in support of petitioner.

The ISBA considers the Illinois Supreme Court's opinion of paramount importance to all attorneys in Illinois. The ISBA does not address the propriety of respondent's conduct or the sanction imposed. Rather, the ISBA is concerned with the court's retroactive application of its holding that giving something of value to a public official is improper and subjects an attorney to sanctions under Illinois' Code of Professional Responsibility.

(Ill.Rev.Stat. ch. 110A, Rule 1-101 *et. seq.*)

That such conduct may be *per se* improper was without precedent in the Illinois Disciplinary Rules, the Code of Professional Responsibility or relevant case law. Moreover, the court's opinion fails to articulate any guidelines for interpretation or application of this newly announced standard.

Statement of the Case

Amicus adopts the statement by petitioner in his Petition, pp. 3-14.

Summary of Argument

The ISBA limits its amicus interest to the Illinois court's finding that giving something of value to public employees or officials, *per se* constitutes a violation of the Illinois Code of Professional Responsibility warranting disbarment.

Substantial constitutional questions have arisen for the first time in the Illinois Supreme Court opinion. Admittedly, no precedent for the ruling existed in Illinois. The retroactive invocation of the newly-engrafted rule to past conduct of petitioner contravenes traditional notions of due process of law. This is especially true when there was absolutely no showing that any illegality or frustration of public policy was involved.

In order to ensure the integrity and fundamental fairness of the disciplinary process, it is incumbent that attorneys, who may be subject to discipline including the loss of license to practice law, be clearly on notice as to what conduct is proscribed. This is particularly important when such proscribed attorney conduct is not prohibited to the public generally or otherwise illegal or against public policy.

Attorneys everywhere ought to be accorded more fundamental fairness than was accorded petitioner at bar regarding the court's holding concerning public employees or officials. The resulting ultimate sanction of disbarment demonstrates the necessity for review by this Court.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ILLINOIS SUPREME COURT ANNOUNCES, WITHOUT ANY GUIDELINES FOR ITS INTERPRETATION OR APPLICATION, A NEW STANDARD OF CONDUCT FOR ILLINOIS ATTORNEYS.

In its decision in this case, the Illinois Supreme Court holds for the first time that giving something of value to public employees and officials, without any showing of illegality or frustration of public policy, constitutes conduct which violates the Illinois Code of Professional Responsibility.

The impact of this decision and its concern to practicing attorneys everywhere is two-fold. First, the court condemned conduct which the Illinois Code did not single out or even hint was improper. Second, retroactive application of this new prohibition read into the Illinois Code may unfairly subject attorneys in Illinois and other states where the issue might arise to discipline for past acts which were not contemporaneously deemed improper.

Due process and equal protection of the law violations arise for the first time in the court's opinion imposing the ultimate sanction of disbarment. It has long been recognized that attorneys have certain rights protected under the Equal Protection and Due Process clauses of the U.S. Constitution. *Spevack v. Klien,* 385 U.S. 511, (1967); *Wilner v. Committee on Character,* 373 U.S. 96 (1963).

Also, this Court has treated state court rules in respect to professional conduct in the same manner as statutes in determining whether due process or equal protection violations have occurred and found substantial constitutional questions arose by reason of a state court's action invoking rules against an attorney. *Konigsberg v. State Bar of California,* 353 U.S. 252, 258 (1957); *Konigsberg v. State Bar of California,* 366 U.S. 36, 45 (1961).

This Court should grant certiorari to determine the retroactivity of state court rulings changing the codes under which

attorneys may be disciplined to conduct not proscribed when the conduct occurred. This Court's ruling is necessary to preserve the integrity and fundamental fairness of state attorney disciplinary systems and clarify the professional standards by which attorneys are to be judged.

A. THE ILLINOIS COURT HOLDS FOR THE FIRST TIME THAT GIVING SOMETHING OF VALUE TO A PUBLIC OFFICIAL OR PUBLIC EMPLOYEE IS *PER SE* IMPROPER CONDUCT WARRANTING DISCIPLINE EVEN THOUGH THE ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DOES NOT PROSCRIBE SUCH ACTIONS.

The ISBA takes no position on the general holding of the Illinois Supreme Court that the conduct of reserving rental cars (and paying for some of the rental car bills) for *judges* supports sanctions for violations of Rules 7-110(a), 1-102(4), 1-102(5), Supreme Court Rule 771 and Canon 9 or on the sanction imposed. (Pet. App. pp. 7a-10a)[1]

The Illinois opinion, however, does not confine itself to addressing such acts. It goes on to hold that "gifts" to public officials also violates the Code. In this respect, the decision is squarely at odds with the same court's decision in *In re Corboy,* 124 Ill.2d 29, 528 N.E.2d 694 (1988), and *In re Powell,* 126 Ill.2d 15, 533 N.E.2d 831 (1988), in that it imposes a sanction on conduct that was never in the annals of disciplinary cases.

In *Corboy,* the Illinois court amended its Rule 7-110(a) (Ill.Rev. Stat. ch. 110 A, rule 7-110(a)) which now states:

> (a) A lawyer shall not give or lend any thing of value to a judge, official, or employee *of a tribunal,* except those gifts or loans which a judge or a member of his family

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[1] The text of the rules involved have been set forth in the petition for certiorari. (Pet. pp. 2-3)

> may receive under Rule 65(C)(4) of the Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office. (Emphasis ours.)

Corboy, 124 Ill.2d at 46, 528 N.E.2d at 701. In *Corboy*, the Illinois court held for the first time that attorney gifts or loans to *judges*, regardless of the attorney's motive or intent, are prohibited by Illinois Rule 7-110(a), unless the gifts or loans fall within one of the exceptions listed in Rule 65(C) (4) (Ill.Rev.Stat. ch. 110A, Rule 65 (C) (4)) of the Illinois Code of Judicial Conduct or unless it is a contribution to the judge's campaign fund as was always permitted by Rule 7-110(a). *Corboy*, 124 Ill.2d at 41, 528 N.E.2d at 699.

Furthermore, "[t]o provide better guidance to lawyers," the court offered several factors to be taken into account in interpreting the scope of its Rule 7-110(a) in conjunction with Rule 65(C) (4) of the Illinois Code of Judicial Conduct. *Corboy*, 124 Ill.2d at 42, 528 N.E.2d at 699.

And finally and most importantly, although holding that the respondents in *Corboy* violated Rule 7-110(a), as amended by the opinion, the Illinois court declined to sanction the respondents in that case. "They acted without the guidance of precedent or settled opinion, and there was, apparently, considerable belief among members of the bar that they had acted properly." 124 Ill.2d at 45, 538 N.E. 2d at 701.

In this case, on the other hand, the Illinois court holds for the first time that the Illinois Code of Professional Responsibility imposes a strict ban on giving something of value to public employees or public officials. The court does not specify what Illinois Disciplinary Rule or Canon of the Code prohibits such conduct, nor does it cite to any prior cases to demonstrate that respondent was put on notice that his conduct was improper. Nevertheless, the Court applied the new "rule" retroactively, and disciplined respondent for it.

The conduct at issue (providing rental cars to public officials without any showing of intent or motive to influence judicial or quasi-judicial decisions), had not theretofore been deemed

violative of Disciplinary Rule 7-110(a), which relates solely to judges, officials, or employees "of a tribunal." Nor does it violate any other specific provision of the Code. Moreover, this conduct was expressly singled out as aggravation justifying disbarment. (Pet., App. 11a)[2]

Apparently, condemnation of this conduct stems from a violation of Illinois Canon 9 when the Illinois court held:

> [B]y fashioning himself a travel agent for judges and at least 14 elected or appointed officials of the city of Chicago, respondent gave the impression of one trying to influence decision makers in all areas of city and county government. While some may view "clout" as an acceptable means of doing business, we will not condone or tolerate this type of activity.

In re D'Angelo, 126 Ill.2d 45, 56, 533 N.E.2d 861, 866.

But if a violation of Illinois Canon 9 was the basis for the discipline imposed, the Illinois court inexplicably ignored its own pronouncement in *In re Powell* (1988), 126 Ill.2d. 15, 533 N.E.2d 831, announced the same day as *D'Angelo.* There it stated:

> We believe that Canon 9 is not a standard of discipline in itself but expresses the policy considerations underlying the disciplinary rules contained within Canon 9. While respondent's conduct was not only improper but also created the appearance of impropriety, *we nevertheless conclude that Canon 9 does not afford a basis for imposing sanction.* (Emphasis ours.)

Thus, the court's statement in *D'Angelo* is inconsistent with the teaching of *Powell,* announced the same day. Confusion can be the only result.

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[2] The only way the conduct could possibly violate Rule 7-110(a) is if any of the public employees or public officials acted in a quasi-judicial or judicial capacity *vis a vis* respondent or his firm. There was no such evidence presented.

It is respectfully submitted that failure to provide guidelines in advance of any rule changes as created here sets members of the bar "sailing in uncharted waters." *Corboy* (1988), 124 Ill.2d at 49, 528 N.E.2d at 703. It ought not be allowed to stand as authoritative precedent.

B. ANY SUCH NEW READING OF THE DISCIPLINARY CODE SHOULD APPLY PROSPECTIVELY TO AVOID UNJUST CONSEQUENCES.

The Illinois decision condemns conduct relating to nonjudicial persons that many members of the bar were not aware was improper prior to the court's opinion. The effect of the court's decision on attorneys is incalculable. Without any precedent or disciplinary rule to guide them, many attorneys may have *in the past* given things of value to friends in public office. Those attorneys must now live under the threat of disciplinary proceedings and potential sanctions.

The Illinois Supreme Court has not heretofore imposed discipline on attorneys for conduct taken without the guidance of rule, precedent or settled opinion. Indeed, in *In re Friedman*, 76 Ill.2d 392, 397, 392 N.E.2d 1333 (1979), it imposed no sanction on an attorney because he acted without "the guidance of precedent or settled opinion." Similarly, in *In re Luster*, 12 Ill.2d 25, 29, 145 N.E.2d 75 (1957), the court declined to impose any sanction where the attorney relied upon an unreported opinion of the court and where the record indicated that "there were scores of other lawyers and law firms of unquestioned standing who were similarly misled."

The Illinois court reaffirmed this eminently just policy in *Corboy*, citing both *Friedman* and *Luster*:

> "They acted without the guidance of precedent or settled opinion, and there was, apparently, considerable belief among members of the bar that they acted properly . . . It would be unfair to apply the limitation we have today for the first time defined to respondents' conduct in 1981." 124 Ill.2d at 45, 528 N.E.2d at 701.

It is clear that neither the Illinois Code of Professional

Responsibility nor prior decisions of the Illinois court prohibited the *per se* giving of something of value to a public official. Prospective application was the only just result consistent with that court's approach in the past. Indeed, to retroactively apply such a drastic change in the interpretation of the Code violates the constitutional guarantees of due process and equal protection as protected by the 14th Amendment to the United States Constitution.

It is respectfully submitted the Illinois opinion raises many questions as to the giving of things of value by attorneys to public officials. The specter of engrafting newly interpreted conduct onto a disciplinary code as an aggravating factor for sanctions transcends elementary principles of fairness and affects all segments of the bar.

CONCLUSION

The Illinois State Bar Association respectfully urges this Court grant certiorari to Petitioner to articulate the parameters of regulating attorneys by imposition of newly engrafted amendments and interpretations to disciplinary rules thereby rendering past conduct violative of the Illinois code. To simply state the proposition delineates the obvious due process and equal protection implications warranting review by this court.

Respectfully submitted,

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